No. 80-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania, *Petitioner.*

v.

PATRICIA SUE BATTLE, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE GRANT OF THE WRIT OF CERTIORARI

GWENDOLYN H. GREGORY
Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666
Counsel of Record

AUGUST W. STEINHILBER
Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

THOMAS A. SHANNON
Executive Director
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

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The National School Boards Association is a non-profit federation of state associations of local school boards, which represent local school boards having responsibility for the education of more than ninety-five percent of this nation's public school children.

Every school district in the country receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. on which the decision of the lower court is based. In addition, every school district in the country receives, or is eligible to receive, other federal financial assistance and, therefore, is subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 even if no financial assistance is received under the Education for All Handicapped Children Act.

The lower court's decision, if left to stand, would have a substantial effect on the content, financing and administration of the educational program of every school district in the country. It is, therefore, of great importance to the full understanding of the implications of this action, for this Court to be fully apprised of the nature of education programs throughout the country and the potential effects which the lower court's decision would have on such programs.

As the decision in this case will have an impact not only on school districts in the Circuit in which petitioners are located, but will affect all school districts throughout the country, the National School Boards Association urges this Court to grant it leave to present its views on the question of whether this Court should grant certiorari herein.

We solicited consent from both the counsel for petitioners, Robert Scanlon, and counsel for respondent, Patricia Sue Battle. Counsel for petitioner granted consent; counsel for respondent refused.

Respectfully submitted,

GWENDOLYN H. GREGORY
Deputy Legal Counsel
Counsel of Record

AUGUST W. STEINHILBER
Legal Counsel

THOMAS A. SHANNON
Executive Director

National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

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The decision of the lower court does not involve a simple judicial interpretation of a statute defining the student services to be provided by Pennsylvania school districts who receive federal funding for handicapped children. To the contrary, the precedent set by this decision affects every school district in the country and could result in a major revision of the very nature of the public educational system.

The lower court decision interprets the provision in the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (hereinafter the Act) which requires that school districts funded under the Act provide their handicapped children a "free appropriate public education." Although a school district could opt out of some of the unique requirements of the Act by foregoing any funding for handicapped education, other requirements have been interpreted as tantamount to civil rights requirements and would subject recipients to scrutiny under civil rights statutes regardless of whether they receive funding under the Act. The requirement of a "free appropriate public education" is one of these.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 prohibits discrimination in federally assisted programs and activities against otherwise qualified handicapped persons. The Department of Education (formerly the Department of Health, Education and Welfare) has interpreted Section 504, in its implementing regulation, to require the provision of a "free appropriate public education," 45 C.F.R. 84. Every school district in the country receives assistance from the Department and, therefore, is subject to the Section 504 regulation and to any other interpretations of the statute made by the Department.

The Department officially announced its position on the merits of the issue at bar when the Department of Justice filed a brief *amicus* in the Third Circuit declaring the government's position that Section 504 prohibits defining a public educational program in terms of a 180 day school year if that definition would deprive a handicapped child of a "free appropriate public education." Further, the Department on Octo-

ber 15, 1980, issued a Report, *Equal Educational Opportunity for Handicapped Children,* setting forth its "Priority Compliance Issues" under the Act and under Section 504. That Report includes a priority compliance issue "Handicapped children denied education in excess of a 180 day school year. . . ." Certainly the Department will be enforcing both the Act and Section 504 with regard to all school districts, regardless of whether they are located in the Third Circuit. And—it appears that the Government is using this 180 day school year interpretation as a means to involve itself in the substantive policymaking of public school educational programs rather than merely assuring that the *process* is equitable. The time is ripe for the Supreme Court to involve itself in this additional all-important issue of whether the Department of Education has overstepped the bounds of its Section 504 enforcement authority by developing a uniform, nationwide policy based on one circuit court opinion.

The financial impact to public education of this case is enormous. The National School Boards Association estimates that it could cost an additional $830 million annually to educate the country's handicapped children if the lower court's decision is allowed to stand.[1]

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[1] This estimate was made on the basis of the statistical information gathered by NSBA for its Study (attached) and by HEW's Office of Education in its Report to Congress: *Progress Toward A Free Appropriate Public Education,* January, 1979. The average annual cost per handicapped child ($2954) was divided by the number of school days per year (180) to reach $16 per day handicapped child. In 1977-78, 3.8 million handicapped children were "counted" for purposes of P.L. 94-142, out of which 25% were "mentally retarded" and 8% were "emotionally disturbed" making a total of 1.25 million children who would be likely to fall into the Plaintiffs' class. [There were also over 25% "learning disabled" children who were not used in our computation.] It

The Third Circuit recognized that financial exigencies are a relevant consideration for courts in their determination in a given case whether a particular child should or should not be afforded an education for a longer period than 180 days. However, the court's mitigation of the financial impact of its decision is illusory. In planning state and local education budgets, state legislatures and local school boards will have to assure that every member of the classification of handicapped children for which a longer educational period potentially would be "appropriate" will be counted in the total budget. Thus a state might meet the mandate of the court but in doing so would have to cut back the remainder of the educational program so as to exclude many other needy students.

If this level of expense is to be mandated of public education providers it would seem that the mandate should come from the highest court in the land and not from a majority of a panel of three circuit judges.

Beyond the financial impact, decisions such as the Third Circuit's threaten to erode state and local decision-making authority in education and endanger the very existence of public schools in this country. The court has gone beyond a requirement that *access* to the school district not be denied on the basis of handicap. The court here seeks to change the very

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would cost approximately $664 per handicapped child to provide summer programs of 40 days. That figure times 1.25 million children reaches a total national annual expenditure of $830 million. That amount would be increased depending on the number of additional days required (*i.e.* weekends and holidays in addition to summers) and would also be increased to the extent the average daily expenditures are increased because of support personnel costs—administration, bus drivers, cafeteria workers, janitors, etc.

nature of the educational program—a significant step which surely cannot be countenanced without a full hearing by the U.S. Supreme Court.

The plight of Respondents in this case, and of their parents, is heartbreaking indeed. But the public school system is designed only to provide an equal *access* to all children. If public education is to be required to redesign that system so as to meet the needs of only one classification of children to the exclusion of others—that requirement should come from a higher source than a U.S. Circuit Court.

Education, as has been noted by this Court on several occasions, is a state function, *Miliken* v. *Bradley,* 94 S. Ct. 3112 (1974); *San Antonio ISD* v. *Rodriguez,* 93 S. Ct. 1278 (1973). The state determines first, whether it will provide a free education to its youth and second, who will provide that education. When it makes that first decision it makes it on the basis of the financial resources available and the various needs of the student population. The length of the school year is not just an arbitrary state or local policy. It defines the parameters of the educational program which the state is agreeing to provide to its school age children. Within those parameters it may be that some children will be provided more services and some less services because of their individual needs—but the school year identifies the *nature* of the educational program, not merely the type of services to be provided to individual students in the program.

Some states operate summer educational programs for certain handicapped children. Some states do not. Some local school systems provide summer educational programs through federal funding or other means.

Most do not. But the issue here is whether every school district in the country, every state in the country, *must* operate a summer educational program and provide services during that summer program to those handicapped children for whom such a program is deemed "appropriate."

Local school systems receive their funding from three sources: local property taxes, federal funding and state funding. State funding is based upon a formula computed as a dollar amount times the average number of children enrolled in the school district during the school year. The school year is set by the state at a prescribed number of days, based on the total amount. In most states the number of school days is set at 180. That does not mean the district may not hold school for a longer period but the district will receive no state money for any period longer than 180 days.

Although the number of school days set is not scientific or based upon an educational table of learning, it is also not arbitrary. The state legislature has determined through the very complex budgetary process that it has a certain amount to devote to education. It then determines that it has sufficient funds to provide an education to all of its public school children for a period of 180 days. That 180 day period, therefore, is the period set for all public education in the state. Deviations from that period must be funded through other sources.

The Court below is bypassing the orderly political and budgetary process of the state to restructure the educational program of the state and either require the state to extend its educational program and fund

local school districts for that extended period or to require the local school district to come up with the additional funding itself through bond issues or some other illusory method.

One other unfortunate result of the decision is the potential increase in number of requests for due process hearings under the Act and under Section 504. School districts will be in the position of either offering a summer program for every handicapped child who is more than minimally handicapped or providing a due process hearing which itself is costly in both dollars and staff time.

Respectfully submitted,

GWENDOLYN H. GREGORY
Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666
Counsel of Record

AUGUST W. STEINHILBER
Legal Counsel
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